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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 490

HUDSON DISTRIBUTORS, INC., APPELLANT,

vs.

ELI LILLY & COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED SEPTEMBER 24, 1963

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SUPREME COURT OF THE UNITED STATES

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[fol. 1]

**IN THE COURT OF COMMON PLEAS
FOR CUYAHOGA COUNTY, OHIO**

No. 730,118

HUDSON DISTRIBUTORS, INC., a corporation, Plaintiff,

vs.

ELI LILLY & COMPANY, a corporation, Defendant.

AMENDED PETITION FOR DECLARATORY JUDGMENT—

January 11, 1960

Plaintiff for its cause of action says that it is a corporation duly organized and existing under and by virtue of the laws of the State of Michigan, with its principal place of business at 415 Euclid Avenue, Cleveland, Ohio, and is duly authorized and licensed to do business as a foreign corporation in the State of Ohio.

Plaintiff is the owner and operator of a retail drug store in which plaintiff dispenses prescriptions, and sells vitamins, drugs, patent and proprietary medicines, cosmetics, sundries and other similar items of merchandise generally associated with a retail drug store.

Plaintiff purchases merchandise for resale which merchandise is manufactured by the defendant and by others in interstate commerce.

Defendant is a corporation organized and existing under and by virtue of the laws of the State of Indiana and does business in the State of Ohio at 1139 Terminal Tower [fol. 2] Building, Cleveland, Ohio. Defendant manufactures and distributes pharmaceuticals and other commodities in the State of Ohio and throughout the United States.

Defendant has long maintained a policy of establishing minimum prices on commodities of its manufacture pursuant to Fair Trade Laws, wherever such laws exist

and of enforcing such minimum prices to the extent permitted by law.

In conformity with this policy and pursuant to the provisions of the Ohio Fair Trade Act, Revised Code, Sections 1333.27 through 1333.34 inclusive, defendant has established minimum resale prices on commodities manufactured by it and has notified plaintiff of its intention to enforce in the State of Ohio minimum resale prices on such commodities.

Defendant identifies the commodities produced by it by the use of trade marks, trade names and brand names. These commodities bear defendant's trade names, trade marks and brand names and are in free and open competition with commodities of the same general class produced by others and offered for sale in the same general market area.

Plaintiff has acquired the commodities bearing the defendant's trade names, trade marks and brand names after receiving notice of defendant's established minimum resale prices. Following receipt of such notice the plaintiff has sold, offered for sale and advertised for sale these commodities produced by defendant at prices lower than the minimum resale prices provided in such notice.

Plaintiff avers that it has not entered into any contract or agreement with defendant or with any other person, which would forbid plaintiff from advertising, offering for sale or selling commodities manufactured by defendant, or by any other person at less than the minimum resale prices stipulated by defendant or by any other person.

A. Plaintiff avers that certain portions of Sections 1333.27 through 1333.34 of the *Ohio Revised Code*, as [fol. 3] hereinafter specified, are void and beyond the power of the General Assembly of the State of Ohio to enact in that they are in violation of certain provisions of the Ohio Constitution, to wit:

1. Section 1333.28 (I), which provided that a distributor who acquires merchandise upon which minimum resale prices have been established, with notice of such minimum prices, is deemed to have entered into an agreement not to sell below such stipulated minimum prices:

(a) Violates Article I, Section 1, by interfering with the right of the plaintiff to enjoy, acquire, purchase and protect property.

(b) Violates Article I, Section 16, by depriving plaintiff of property without due process of law.

(c) Violates Article I, Section 19, by confiscating plaintiff's private property.

2. Section 1333.29 (A), which provided that a proprietor may establish and control minimum prices by notice to distributors:

(a) Violates Article I, Section 16 by depriving plaintiff of property without due process of law.

(b) Violates Article II, Section 1, by unlawfully delegating legislative power to the defendant herein and to other private persons.

(c) Is an unconstitutional exercise of the police power, in that it bears no relation to the public health, welfare, safety or morals.

3. Section 1333.29 (B), which provides that, after giving notice, the proprietor may require the distributor to sell at not less than the minimum resale prices stipulated by the proprietor and may further require the distributor not to sell to any other distributor without first obtaining an agreement from such other distributor that he will not sell at prices less than the minimum resale prices stipulated by the proprietor:

[fol. 4] (a) Violates Article I, Section 1, by interfering with the right of the plaintiff to enjoy, acquire, purchase and protect property.

(b) Violates Article I, Section 16, by depriving plaintiff of property without due process of law.

(c) Violates Article I, Section 19, by confiscating plaintiff's private property.

4. Section 1333.29 (C), which provides that any contract or notice authorized pursuant to the statute shall be for the benefit of the proprietor and any distributor bound by a similar contract or notice:

4
(a) Violates Article I, Section 2, by denying plaintiff equal protection of the law and by granting special privileges and immunities to the defendant and to others.

(b) Is an unconstitutional exercise of the police power, in that it bears no relation to the public health, welfare, safety or morals.

(c) Is in conflict with the purpose clause, Section 1333.27 (A) which states that the legislature enacted this legislation to protect and preserve small business.

5. Section 1333.30, which provides that deposit in the mail with postage prepaid of a letter properly addressed to a distributor specifying minimum resale prices established by a proprietor constitutes prima facie evidence of actual notice to said distributor and that the acquisition of merchandise clearly marked or the invoice of which was clearly marked with minimum resale prices established by a proprietor is conclusive evidence of actual notice:

(a) Violates Article I, Section 16 by depriving plaintiff of property without due process of law.

6. Section 1333.31, which provides that the proprietor shall retain a proprietary interest in a commodity so long as such commodity is identified by his trade mark or trade name:

[fol. 5] (a) Violates Article I, Section 1, by interfering with the right of the plaintiff to enjoy, acquire, purchase and protect property.

(b) Violates Article I, Section 16, by depriving plaintiff of property without due process of law.

(c) Violates Article I, Section 19, by confiscating plaintiff's private property.

7. Section 1333.32 (A), which provides that it is unlawful and unfair competition for one with notice, to sell, offer to sell or advertise for sale any commodity upon which the proprietor has established minimum resale prices:

(a) Violates Article I, Section 16, by depriving plaintiff of property without due process of law.

8. Section 1333.32 (B), which provides that any person suffering or reasonably anticipating damage by reason of a violation of this Section may bring suit:

(a) Violates Article I, Section 16, by depriving plaintiff of property without due process of law.

B. Plaintiff further avers that certain portions of Section 1333.27 through 1333.34, *Ohio Revised Code*, as hereinafter specified, are void and beyond the power of the General Assembly of the State of Ohio to enact in that they are contrary to and inconsistent with the Sherman Anti-Trust Act, 26 Stat. 209, as amended, 15 U. S. C., Sections 1 through 8, and do not fall under the exemptions of the Miller-Tydings Act, 50 Stat. 693, 15 U. S. C., Sec. 1, or the McGuire Act, 66 Stat. 632, 15 U. S. C., Section 45, and hence violate Article VI, Clause 2 of the United States Constitution, the Supremacy Clause.

1. Section 1333.29 (B), which provides that after giving notice, the proprietor may require the distributor to sell at not less than the minimum resale price stipulated [fol. 6] by the proprietor and may further require the distributor not to sell to any other distributor without first obtaining an agreement from such other distributor that he will not sell at prices less than the minimum resale prices stipulated by the proprietor, is contrary to and inconsistent with Section 1 of the Sherman Act, as amended by the Miller-Tydings Act, and Section 5(a)(2) and (3) of the McGuire Act in that the Sherman Act, as amended by the Miller-Tydings Act, and the McGuire Act only permit states, territories and the District of Columbia to enact legislation authorizing contracts or agreements prescribing minimum prices.

2. Section 1333.32 (A), which provides that it is unlawful and unfair competition for one with notice, to sell, offer to sell or advertise for sale any commodity upon which the proprietor has established minimum resale prices, is contrary to and inconsistent with Section 5(a)(3) of the McGuire Act in that the McGuire Act requires that the non-signer act wilfully and knowingly.

3. Section 1333.32 (B), which provides that suit may be brought by any person reasonably anticipating damage

is contrary to and inconsistent with Section 5 (a) (3) of the McGuire Act, in that, under the McGuire Act, suit may be brought only by a person actually damaged.

C. Plaintiff further says that Sections 1333.28 (I), 1333.29 (A) and (B), 1333.30, 1333.31 and 1333.32 (A) and (B), of the *Ohio Revised Code* violate the Due Process Clause of the 14th Amendment to the Constitution to the United States of America, in that they deprive plaintiff of property without due process of law.

D. Plaintiff further avers that those sections of the Fair Trade Act which are null and void due to violations of the Federal and Ohio Constitutions are so commingled and intermingled that they are incapable of separation and therefore the entire Fair Trade Act (*Revised Code*, [fol. 7] Sections 1333.27 through 1333.32 inclusive) is unconstitutional.

Plaintiff states that, as set forth hereinabove, it has the right to sell property manufactured by the defendant and by others at below fixed prices whenever plaintiff determines it to be most advantageous and beneficial for its business and for the general public. This right to sell below fixed prices is a valuable property right. The Fair Trade Act (*Revised Code*, Sections 1333.27 through 1333.34 inclusive) arbitrarily imposes restrictions upon plaintiff's valuable property rights and deprives plaintiff of its property without due process of law.

An actual controversy exists between plaintiff and defendant which must be resolved and the rights of the parties finally adjudicated. Plaintiff therefore brings this action in accordance with the provisions of Sections 2721.01 through 2721.15, of the *Ohio Revised Code*, known as "The Uniform Declaratory Judgment Act," asks that this Court construe the Fair Trade Act and determine the plaintiff's rights thereunder, and declare said Act to be invalid, unconstitutional, null and void and of no effect. Plaintiff makes no claim in this proceeding for any monetary relief whatsoever.

Wherefore, plaintiff prays that this Honorable Court construe the Fair Trade Act (*Revised Code*, Sections 1333.27 through 1333.34, inclusive), determine plaintiff's

rights thereunder and declare said Act and the individual sections thereof to be invalid, unconstitutional, null and void, and of no effect whatsoever in its and their application to plaintiff herein.

Mendelsohn, Krotinger & Lane, By Myron H. Krotinger, Attorneys for Plaintiff.

Of Counsel: Mendelsohn, Krotinger & Lane, Hertzberg & Weingarten.

[fol 8]

IN THE COURT OF COMMON PLEAS

ANSWER AND CROSS-PETITION—February 29, 1960

Answer.

Now comes the defendant, Eli Lilly and Company, and for its Answer to plaintiff's Amended Petition—

1. Admits the allegations contained in unnumbered paragraphs one, two, three, four and five of page 1, and in unnumbered paragraphs one, two and three of page 2, of the Amended Petition.

2. Denies each and every other allegation of the Amended Petition, and specifically the allegations contained in all paragraphs beginning with and following unnumbered paragraph four of page 2 of the Amended Petition.

Cross-Petition.

By way of Cross-Petition the defendant, Eli Lilly and Company, adopts by reference all of the allegations contained in the Amended Petition which are admitted in paragraph 1 of the above Answer, and says further—

3. The pharmaceuticals and other commodities produced and sold by defendant, and so identified by its trademarks, trade names and brand names, are sold, offered for sale and advertised for sale in retail pharmaceutical outlets in the State of Ohio and throughout the United States.

4. Such commodities have been widely and extensively promoted and advertised in the State of Ohio and throughout the United States, and defendant has expended large sums of money in such promotion and advertising; through such promotion and advertising defendant's trademarks, trade names and brand names have become well and favorably known to the pharmaceutical trade, the medical profession and the public in general, in the State of Ohio and throughout the United States, as identifying commodities [fol. 9] manufactured and produced by defendant, and defendant has thereby acquired and possesses a valuable reputation and goodwill attached to such trademarks, trade names and brand names.

5. Under date of October 1, 1959, defendant notified plaintiff and all known Ohio retail pharmaceutical outlets selling defendant's commodities in writing of its intention and policy to establish minimum retail resale prices for its commodities pursuant to the Ohio Fair Trade Act, Ohio Revised Code, Sections 1333.27 through 1333.34, and invited them to enter into fair trade contracts with defendant. A true copy of such notification is attached hereto as "Exhibit A" and made a part hereof.

6. Defendant has entered into such fair trade contracts which are still in full force and effect with numerous retail pharmaceutical outlets in Ohio, by the terms of which defendant established minimum retail resale prices for its commodities and the retailer agreed not to sell, offer to sell or advertise for sale at retail defendant's commodities at prices less than the minimum retail resale prices so established; a true copy of such a contract is attached hereto as "Exhibit B" and made a part hereof.

7. Under date of December 10, 1959, defendant wrote plaintiff by certified mail that it had been informed plaintiff was selling defendant's commodities, so identified, at prices below the minimum retail resale prices established by defendant for such commodities, again advised plaintiff of the establishment by defendant of minimum retail resale prices for its commodities and specified such prices to plaintiff, and again advised plaintiff that defendant had


entered into fair trade contracts with numerous Ohio retail pharmaceutical outlets and invited plaintiff to enter into such a contract with defendant. A true copy of such notification is attached hereto as "Exhibit C" and made a part hereof.

[fol. 10] 8. Under date of January 26, 1960, defendant again wrote plaintiff by certified mail advising plaintiff of the establishment by defendant of minimum retail resale prices for its commodities and specifying such prices, and advising plaintiff that defendant had entered into fair trade contracts with numerous Ohio retail pharmaceutical outlets. A true copy of such notification is attached hereto as "Exhibit D" and made a part hereof.

9. Plaintiff has wilfully and knowingly sold, offered for sale and advertised for sale at prices less than defendant's established minimum retail resale prices commodities of defendant, so identified, which were acquired by plaintiff after notice to it of the establishment by defendant of minimum retail resale prices for such commodities and of such prices, and after notice to it of the entering into by defendant of fair trade contracts with Ohio retail pharmaceutical outlets.

10. Such sales by plaintiff were not: (a) in closing out plaintiff's stock of such commodities for the purpose of discontinuing dealing therein; (b) of such commodities which were altered, secondhand, damaged, defaced or deteriorated; (c) by an officer acting under court order; or (d) of such commodities after removal of all trace of defendant's trademarks, trade names or brand names.

11. Plaintiff's wilful and knowing sale, offering for sale and advertising for sale of such commodities of defendant, so identified, and so acquired by plaintiff, at prices less than such established minimum retail resale prices have deprived defendant of the benefit of the Ohio Fair Trade Act, and have caused and threaten to cause irreparable damage to defendant's business and goodwill and to the value of defendant's trademarks, trade names and brand names.



12. Defendant is unable to state the exact amount of damage it has thus suffered until an accounting shall be made of such transactions by plaintiff.

[fol. 11] 13. Unless restrained and enjoined by an order of this Court, plaintiff will continue to wilfully and knowingly sell, offer for sale and advertise for sale such commodities of defendant, so identified, and so acquired by plaintiff, at prices below such minimum retail resale prices established by defendant.

14. Defendant has no adequate remedy at law with respect to the matters herein alleged.

Wherefore, defendant respectfully prays—

A. That pending final decision of this cause the Court grant it a temporary order enjoining plaintiff, and its officers, employees, agents, and successors and assigns, from selling, offering for sale or advertising for sale at retail such commodities produced by defendant, so identified, and so acquired by plaintiff, at prices below the minimum retail resale prices now established by defendant or hereafter established by defendant pursuant to the provisions of the Ohio Fair Trade Act, and pursuant to the fair trade contracts executed by defendant and in effect in the State of Ohio.

B. That upon final hearing of this cause, such order be made permanent.

C. That the Court grant it an order authorizing defendant to make or cause to be made by certified public accountants an audit of plaintiff's books to and including the date of such temporary order with regard to all transactions involving such commodities produced by defendant, so identified, and so acquired by plaintiff, and that plaintiff be required to account to defendant for all profits derived by it, and for all damages suffered by defendant, by reason of the unlawful acts of plaintiff claimed herein.

D. That it be awarded recovery against plaintiff of all damages and costs suffered by defendant on account of said unlawful acts of plaintiff, including the costs of this suit and reasonable attorney fees.

[fol. 12]. E. That it be afforded such further orders and relief in the premises as may be just and proper.

Henderson, Quail, Schneider & Peirce, By Louis S. Peirce, Attorneys for Defendant.

[fol. 13]

EXHIBIT A TO ANSWER AND CROSS PETITION.

(Filed in Common Pleas Court February 29, 1960.)

Notification from Defendant to Its Retail Distributors,
Dated October 1, 1959.

ELI LILLY AND COMPANY

Indianapolis 6, U. S. A.—Melrose 6-2211

October 1, 1959

TO THE PHARMACISTS OF OHIO

Eli Lilly and Company wishes to congratulate the pharmacists of Ohio for their successful efforts in obtaining passage of the new Ohio Fair Trade Act.

This company will continue to vigorously support fair trade and wishes to give you notice of this policy. We have enclosed duplicate copies of our standard form Manufacturer-Retailer Fair Trade Contract, which we invite you to sign. This contract supersedes those executed under the prior Ohio Fair Trade Law.

[fol. 14] You may indicate your desire to enter into the contract by signing both copies of this contract and returning them in the enclosed envelope. We will then approve the contract in Indianapolis and send you a fully executed copy of the contract for your files.

Very truly yours,

ELI LILLY AND COMPANY

A. J. W. LEBIEN,

Vice President, Marketing.

jj

enclosures

[fol. 15]

EXHIBIT B TO ANSWER AND CROSS-PETITION

ELI LILLY AND COMPANY MANUFACTURER-RETAILER
CONTRACT

THIS AGREEMENT executed in duplicate by and between ELI LILLY AND COMPANY, an Indiana corporation of Indianapolis, Indiana, (hereinafter called Manufacturer) and A and A Drug Co. doing business at 5408 Superior Ave., Cleveland, Ohio, (hereinafter called Retailer); WITNESSETH:

WHEREAS Manufacturer is engaged in the manufacture and sale of a complete line of pharmaceutical and biological commodities which are identified by its trademarks, brands, and name, and which are in free, fair, and open competition with commodities of the same general class manufactured and distributed by others, and Retailer is engaged in the sale and distribution at retail of Manufacturer's "Identified Commodities" and of competitive commodities produced by others, and the parties hereto desire to avail themselves of the benefits of the Fair Trade Act enacted by the state in which Retailer does business, as shown above;

NOW, THEREFORE, the parties do hereby stipulate and agree as follows:

1. Manufacturer's "Identified Commodities" shall mean and include all products listed in Manufacturer's current catalog or in any revision thereof which bear or the labels or containers of which bear the trade-marks, brands, or [fol. 16] name of Manufacturer and which are in free, fair, and open competition with commodities of the same general class produced or distributed by others.

2. Retailer hereby agrees not to sell, offer to sell, or advertise any of Manufacturer's "Identified Commodities" at less than the minimum retail resale prices therefor established by Manufacturer under Paragraph 3 hereof; provided, however, that such minimum retail resale prices shall not apply to sales made by Retailer to physicians,

dentists, veterinarians, hospitals, or state, county, or municipal institutions.

3. The minimum retail resale prices for Manufacturer's "Identified Commodities" shall be ten (10%) percent less than the List Prices respectively designated therefor in Manufacturer's current catalog or in any revision thereof, it being agreed that said catalog, together with any such revisions, shall be deemed to be incorporated herein as a part of this contract.

4. Manufacturer reserves the right to effect such changes in the "Identified Commodities" listed in its said catalog and in the minimum retail resale prices established therefor as it, in its sole discretion, may determine, and it is agreed that all such changes shall become effective and binding upon Retailer upon receipt of written or printed price revision sheets.

5. The following acts or practices shall be deemed to constitute a violation of Paragraph 2 hereof:

a. The giving by Retailer of anything of value, whether tangible or intangible, in connection with the sale of any of Manufacturer's "Identified Commodities."

b. The granting of any kind of a concession whatsoever in connection with the sale of Manufacturer's "Identified Commodities."

[fol. 17] c. The sale of any merchandise in combination with the sale of Manufacturer's "Identified Commodities."

6. Retailer agrees not to knowingly sell any of Manufacturer's "Identified Commodities" to any dealer who fails to observe the minimum retail resale prices established under Paragraph 3 hereof.

7. It is agreed that the minimum retail resale prices established under Paragraph 3 hereof shall not apply to any transaction specifically exempted from the operation of this Contract under the provisions of the Fair Trade Act of the state in which Retailer does business.

8. In consideration of the execution hereof by Retailer, it is agreed that to the extent permitted by law, Manufacturer will use every reasonable means to prevent the sale of its "Identified Commodities" by any dealer in competition with Retailer at prices less than the minimum retail resale prices established under Paragraph 3 hereof. In the performance of its obligations under this paragraph Manufacturer shall not be required to institute legal proceedings unless such action in Manufacturer's judgment is necessary and feasible, and in determining this question Manufacturer may take into account, among other things, the expense involved and the pendency of similar actions.

9. This Contract shall be interpreted under and shall be subject to the limitations imposed by the Fair Trade Act of the state in which Retailer does business, and in the event any provision of this Contract shall be held invalid under such Act or under any other statute, law, or public policy, or in the event this Contract shall be held inapplicable with respect to any given set of facts or circumstances, then, or in either of such events, the remaining provisions of this Contract and its applicability to all other sets of facts or circumstances shall be unaffected thereby.

[fol. 18] 10. This Contract shall apply only to the resale of Manufacturer's "Identified Commodities" by Retailer within the state in which Retailer does business.

11. This Contract shall remain and continue in full force and effect until and unless the same is terminated as hereinafter provided. Either party hereto may cancel or terminate this Contract by giving not less than thirty (30) days' notice in writing to the other party of his intention so to do. Any notice under this Contract given by either party to the other shall be sufficient if it is deposited in the United States Mail in a duly stamped envelope and addressed to the party hereto at the address designated in the opening Paragraph of this Contract. The termination of this Contract by Retailer, under the terms of this Paragraph, shall not relieve it of any obligation imposed under the Fair Trade Act of the state in which Retailer does business, nor shall either of the parties hereto, by virtue of

such termination, be deprived of any rights granted under such Act.

Executed this 22nd day of October, 1959.

ELI LILLY AND COMPANY
By H. B. BLACKWELL
Manufacturer

A & A DRUG
By RUEBEN ADELSTEIN
Retailer

Not effective until approved by an
officer of Manufacturer at its Indian-
apolis office.

Approved: ELI LILLY AND COMPANY
By EUGENE U. BEESLEY
President

[fol. 19]

EXHIBIT C TO ANSWER AND CROSS PETITION.

(Filed in Common Pleas Court February 29, 1960.)

Warning Letter from Defendant to Plaintiff
Dated December 10, 1959.

ELI LILLY AND COMPANY

Indianapolis 6, U. S. A.—Melrose 6-2211

December 10, 1959

Hudson Vitamin & Cosmetic Distributors, Inc.
415 Euclid Avenue
Cleveland 14, Ohio

Gentlemen:

We have been informed that you are selling Eli Lilly and Company products at prices below the minimum retail resale prices established for them in accordance with the provisions of the Ohio Fair Trade Act.

We are enclosing for your information duplicate copies of our regular form of Manufacturer-Retailer Fair Trade Contract which has been signed by a substantial number of retail druggists in the State of Ohio and in your community and which is now in full force and effect. Under the provisions of these contracts, we have established minimum retail resale prices for our trademarked commodities at ten percent less than the list prices shown in our current Price List. You have been furnished with a copy of the Lilly Price List, and you are furnished with changes in this Price List at regular intervals.

Under the provisions of the Ohio Fair Trade Act, you are required to adhere to the minimum retail resale prices which we have established for our products, as explained above, even though you may not have signed one of our Manufacturer-Retailer Fair Trade Contracts.

We trust that your future operations will be strictly in accordance with the obligations imposed upon you under the Ohio Fair Trade Act, so that there will be no occasion for any further controversy or litigation.

Very truly yours,

ELI LILLY AND COMPANY
H. B. BLACKWELL
Legal Department

HBB:jw
Enclosure
Certified Mail

[fol. 21]

EXHIBIT D TO ANSWER AND CROSS PETITION.

(Filed in Common Pleas Court February 29, 1960.)

Second Warning Letter from Defendant to Plaintiff
Dated January 26, 1960.

ELI LILLY AND COMPANY

Indianapolis 6, U. S. A.—MEIrose 6-2211

January 26, 1960

Hudson Vitamin & Cosmetic Distributors, Inc.
415 Euclid Avenue
Cleveland 14, Ohio

Gentlemen:

We have again been informed that you are selling our products at prices below the minimum retail resale prices established for them in accordance with the provisions of the Ohio Fair Trade Act. Specifically, it has been reported that you are selling MI-CEBRIN (vitamin-mineral supplements, Lilly) 100's, for \$4.38; MULTICEBRIN (pan-vitamins, Lilly) 100's, for \$3.71; and MULTICEBRIN JR. (pan-vitamins, Lilly) 60's for \$1.81, whereas the fair trade prices for these products are \$5.98, \$5.08, and \$2.49, respectively.

You will recall that we wrote to you on December 10, 1959, concerning the sale of our products below the minimum retail resale prices; and we enclosed for you information duplicate copies of our Manufacturer-Retailer Fair Trade Contract. Under the terms of this contract we have established minimum retail resale prices for products bearing our trademarks, brands, or name at ten percent less than the list prices shown in our current Price List. Under the provisions of the Ohio Fair Trade Act you are obligated to uphold our minimum retail resale prices whether you have signed one of our contracts or not.

[fol. 22] It is our policy to employ all reasonable means to require the uniform observance of the minimum retail resale prices which we have established, and in our general

enforcement policy we are prepared to file suits for injunctions where contract violations cannot be adjusted on a voluntary basis.

We trust that your future operations will be in accordance with your obligations under the contracts and under the Ohio Fair Trade Act, so that there will be no occasion for further controversy or litigation.

Very truly yours,

ELI LILLY AND COMPANY
H. B. BLACKWELL
Legal Department

HBB:jj

Enclosure

Certified Mail Return Receipt Requested

[fol. 23]

IN THE COURT OF COMMON PLEAS

ANSWER TO CROSS-PETITION—Filed April 21, 1960.

Now comes the plaintiff and for its answer to defendant's cross-petition, plaintiff admits the allegations contained in paragraph 3 of the cross-petition.

Plaintiff admits that defendant's products have been extensively advertised, but denies all other allegations of paragraph 4 of the cross-petition.

Plaintiff admits the allegations contained in paragraph 5 of the cross-petition.

Plaintiff denies the allegations contained in paragraph 6 of the cross-petition.

Plaintiff admits that defendant has notified plaintiff of defendant's purported establishment of minimum resale prices, but denies all other allegations of the cross-petition.

Plaintiff admits the allegations contained in paragraph 8 of the cross-petition.

Plaintiff admits that it has offered for sale and sold products bearing defendant's trademarks, but denies all other allegations of paragraph 9 of the cross-petition.

Plaintiff denies the allegations contained in paragraphs 10, 11, 12, 13 and 14 of the cross-petition.

Further answering, plaintiff denies each and every allegation of the cross-petition not herein expressly admitted to be true.

Wherefore, plaintiff prays that the relief prayed for in its second amended petition be granted and that defendant's cross-petition be dismissed at defendant's costs and for such other, further, and supplemental relief as will be equitable in the premises.

Mendelsohn, Krottinger & Lane, By Myron N. Krottinger, By Leonard Lane, Attorneys for Plaintiff.

[fol. 24]

IN THE COURT OF COMMON PLEAS

AGREED STATEMENT OF FACTS—Filed June 10, 1960

It is agreed by and between the parties hereto that the following stated facts are true, but each of the parties reserves the right to object to the relevancy or materiality of any such fact or facts:

1. Plaintiff, Hudson Distributors, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Michigan, with its principal place of business in Ohio located at 415 Euclid Avenue, Cleveland, Ohio, and is duly licensed to do business in the State of Ohio.
2. Defendant, Eli Lilly and Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana, and its District Manager has an office in the State of Ohio at 1139 Terminal Tower Building, Cleveland, Ohio.
3. Plaintiff is the owner and operator of a retail store in which plaintiff dispenses prescriptions and sells vitamins, drugs, patent and proprietary medicines, cosmetics, sundries and other similar items of merchandise, which are purchased by plaintiff in interstate commerce.
4. Defendant produces pharmaceuticals and other commodities which are sold by defendant in interstate com-

merce to wholesale pharmaceutical outlets only in the State of Ohio and throughout the United States.

5. Defendant's commodities are sold, offered for sale and advertised for sale in retail pharmaceutical outlets in the State of Ohio and throughout the United States.

6. All commodities produced by defendant are sold under defendant's trade name "Eli Lilly," and under other trademarks, trade names and brand names of defendant, such as "Homicebrin," "Multicebrin" and "Iletin," used for the purpose of identifying the products as having been produced by the defendant.

[fol. 25] 7. All commodities produced by defendant which are sold, offered for sale and advertised for sale in the State of Ohio are in free and open competition with commodities of the same general class produced by others and sold, offered for sale and advertised for sale in the State of Ohio.

8. Plaintiff purchases in interstate commerce commodities for resale, including commodities produced by the defendant, and sells, offers for sale and advertises for sale such commodities at retail in the State of Ohio.

9. Defendant has long maintained a policy of establishing minimum wholesale and retail resale prices for commodities produced by it pursuant to state fair trade laws, where such exist, and of enforcing such resale prices to the extent permitted by law.

10. The commodities produced by defendant have been widely and extensively promoted and advertised by defendant in the State of Ohio and throughout the United States, and defendant has expended large sums of money in such promotion and advertising.

11. Defendant's trademarks, trade names and brand names have become well and favorably known to the pharmaceutical trade, the medical profession and the public generally in the State of Ohio and throughout the United States as identifying commodities produced by defendant.

12. Under date of October 1, 1959, defendant notified plaintiff and all known Ohio retail pharmaceutical outlets

selling defendant's commodities in writing of its intention and policy to establish minimum retail resale prices for its commodities pursuant to the Ohio Fair Trade Act, Ohio Revised Code, Sections 1333.27 through 1333.34, and invited them to enter into written fair trade contracts with defendant. A true copy of such notification is attached to the Answer and Cross-Petition filed herein as "Exhibit A."

[fol. 26] 13. Prior to December 10, 1959, defendant had entered into written fair trade contracts which are still in full force and effect with numerous retail pharmaceutical outlets in Ohio, by the terms of which defendant established minimum retail resale prices for its commodities pursuant to the provisions of the Ohio Fair Trade Act and the retailer agreed not to sell, offer to sell or advertise for sale at retail defendant's commodities at prices less than the minimum retail resale prices so established. A true copy of such a contract is attached to the Answer and Cross-Petition herein as "Exhibit B."

14. Under date of December 10, 1959, defendant wrote plaintiff by certified mail that it had been informed plaintiff was selling defendant's commodities at prices below the minimum retail resale prices established by defendant for such commodities pursuant to the provisions of the Ohio Fair Trade Act, advised plaintiff that defendant had entered into written fair trade contracts with numerous Ohio retail pharmaceutical outlets by which defendant established minimum retail resale prices for its commodities pursuant to the provisions of the Ohio Fair Trade Act, and specified such prices to plaintiff, and invited plaintiff to enter into such a written contract with defendant. A true copy of such notification is attached to the Answer and Cross-Petition herein as "Exhibit C."

15. Under date of January 26, 1960, defendant wrote plaintiff by certified mail again advising plaintiff that defendant had entered into written fair trade contracts with numerous Ohio retail pharmaceutical outlets by the terms of which defendant established minimum retail resale prices for its commodities pursuant to the provisions of the Ohio Fair Trade Act, and again specifying such prices. A true copy of such notification is attached to the Answer and Cross-Petition herein as "Exhibit D."

16. Plaintiff has not entered into any written contract or agreement with defendant which would forbid plaintiff [fol. 27] from selling, offering for sale or advertising for sale commodities produced by defendant at prices less than the minimum retail resale prices established by defendant pursuant to the provisions of the Ohio Fair Trade Act.

17. Plaintiff purchased in interstate commerce and accepted commodities produced by defendant, and identified by defendant's trademarks, trade names or brand names, after the notifications to it described in paragraphs 14 and 15, above.

18. Plaintiff has sold, offered for sale and advertised for sale, and is selling, offering for sale and advertising for sale, commodities produced by defendant and so identified, which were purchased and accepted by plaintiff after such notifications to it described in paragraphs 14 and 15, above, at prices less than the minimum retail resale prices so established by defendant pursuant to the provisions of the Ohio Fair Trade Act.

19. Such sales, offerings for sale and advertisings for sale by plaintiff were not: (a) in closing out plaintiff's stock of such commodities for the purpose of discontinuing dealing therein; (b) of such commodities which were altered, second hand, damaged, defaced, or deteriorated; (c) by an officer acting under court order; or (d) of such commodities after removal of all traces of defendant's trademarks, trade names or brand names.

Mendelsohn, Krotinger & Lane, By Myron N.
Krotinger, Attorneys for Plaintiff.

Henderson, Quail, Schneider & Peirce, By James I.
Huston, Attorneys for Defendant.

[fol. 28]

IN THE COURT OF COMMON PLEAS

STIPULATION RE EVIDENCE—Filed June 25, 1960.

It is agreed by and between the parties hereto that the following documents are introduced into evidence in this cause, and both parties waive the right to object to the competency thereof but expressly reserve the right to object to the materiality or relevancy thereof:

1. Plaintiff's Exhibit 1—Affidavit of Bernard Shulman,
2. Plaintiff's Exhibit 2—Affidavit of Ernest C. T. Santora.
3. Plaintiff's Exhibit 3—Affidavit of S. Sterling McMillan.
4. Plaintiff's Exhibits 4, 5 and 6—Copies of the Lilly Digest for the years 1956, 1957 and 1958, respectively.
5. Plaintiff's Exhibits 7, 8 and 9—Price Lists of Eli Lilly and Company No. 67, effective January 2, 1956, No. 68, effective May 6, 1957, and No. 69, effective January 5, 1959, respectively.
6. Defendant's Exhibits A, B, C and D—Copies of letters and a contract, all attached to defendant's Answer and Cross-Petition.
7. Defendant's Exhibit E—Transcripts of the hearings of the Ohio General Assembly on House Bill No. 318, the Ohio Fair Trade Act, being hearings before the Ohio House Judiciary Committee on April 15, April 22 and April 29, 1959, and before the Ohio Senate Judiciary Committee on May 28, June 4 and June 9, 1959.
8. Defendant's Exhibit F—Affidavit of J. H. Rushton.
9. Defendant's Exhibit G—Affidavit of William R. Hutchinson.

[fol. 29] 10. Plaintiff's Exhibit 10—Eli Lilly and Company, Report to the Stockholders—1959.

Mendelsohn, Krotinger & Lane, By Myron N. Krotinger, Attorneys for Plaintiff.

Henderson, Quail, Schneider & Peirce, By James I. Huston, Attorneys for Defendant.

PLAINTIFF'S EXHIBIT 1 TO STIPULATION

Affidavit of Bernard Shulman.

STATE OF MICHIGAN,
COUNTY OF WAYNE, SS.

BERNARD SHULMAN, being first duly sworn, according to law deposes and says that he is the President of Hudson Distributors, Inc. and other corporations which operate drug stores and retail outlets which sell products manufactured by Eli Lilly and Company and other commodities generally sold by drug stores in the Norwood, Cincinnati, Dayton, Columbus, Cleveland and Youngstown areas.

Affiant further says that he is a registered pharmacist and has been in the retail drug business for twenty-two (22) years; that because of his experience in this field of business, he has a wide and general knowledge of the retail drug and cosmetic business and is thoroughly familiar with and has for many years sold the line of drugs manufactured by Eli Lilly and Company.

Affiant further says that during the years in which he has been active in the retail drug business, the sales of Eli Lilly and Company products in the City of Cleveland and the State of Ohio and throughout the nation have increased steadily. The national net sales of Eli Lilly and Company [fol. 30] have increased from \$119,670,000.00 in 1950 to \$199,800,000.00 in 1957, with a slight decrease in the business recession year of 1958 to \$180,470,000.00, with a raise again in 1959 to \$187,010,000.00. These increases have oc-

current although fair trade statutes have not been enacted or are not enforceable against non-signers in some twenty (20) states and in the District of Columbia.

Affiant further says that Hudson Distributors, Inc., the plaintiff in this action, does not purchase any of the products of Eli Lilly and Company from the defendant. Hudson Distributors, Inc. buys products of Eli Lilly and Company for resale to the public from Regal D. S., Inc., a Michigan corporation located in the City of Detroit; that the said Regal D. S., Inc. is a warehouse company engaged in the sale of drugs and cosmetics to Hudson Distributors, Inc. and other companies of which affiant is President.

Affiant further says that Regal D. S., Inc. sells products manufactured by Eli Lilly and Company to Hudson Distributors, Inc. as a part of its regular course of business in interstate commerce. Hudson Distributors, Inc. purchases products of Eli Lilly and Company in anticipation of the resale of such commodities to the consuming public. Purchases by Hudson Distributors, Inc. are made from Regal D. S., Inc. at regular weekly intervals with the shipment of the products of Eli Lilly and Company being made regularly from the State of Michigan to the State of Ohio for resale by the plaintiff.

Affiant further says that the policy of Hudson Distributors, Inc. and its affiliates is to sell goods at a price which brings it a reasonable profit. Hudson Distributors, Inc. has not and does not engage in "loss leader merchandising" or "bait advertising" of any kind. All of the products retailed by Hudson Distributors, Inc. are sold at a profit to the plaintiff. The method of doing business of Hudson Distributors, Inc. permits it to engage in a profitable course of business and to sell products at prices lower than those [fol. 31] set by Eli Lilly and Company and by other persons, firms and corporations engaged in the manufacture of drugs and cosmetics because Hudson Distributors, Inc. has kept its operating costs at a level which permit such merchandising.

Affiant further says that the plaintiff is the beneficiary of Hudson's method of doing business. Goods are made available to great numbers of people at prices which permit a constantly greater percentage of the population to

enjoy the benefits of a large participation in the production bounty of the United States at a lower cost. The result has been to create a constantly expanding market for the products of Eli Lilly and Company and other manufacturers of drugs and cosmetics among people who otherwise could not afford them.

Affiant further says that no attempt has been made by Hudson Distributors, Inc. to monopolize the retail drug field or to institute a price war, and since it began business in Cleveland there has been no monopoly of the retail field or a price war in the City of Cleveland or its environs. Neither has there been a monopoly of the retail field or a price war in any of the other areas in which Hudson Distributors, Inc. and its affiliates operate drug stores or retail outlets. No price war can result from the sales activities of Hudson Distributors, Inc. because Hudson Distributors, Inc. never sells below its wholesale cost.

Affiant further says that the dollar volume of sales of Eli Lilly and Company products have not decreased in the Cleveland area since Hudson Distributors, Inc. started its operations, but, on the contrary, these sales have steadily increased in volume since 1957. The reputation for excellence of production of Eli Lilly and Company products and the consumer appeal of such products have steadily increased for the years 1957, 1958, 1959 and 1960 to date despite the fact that in January, 1958, the Ohio Supreme Court declared the old Fair Trade Law unconstitutional [fol. 32] insofar as it attempted to bind non-signers of fair trade contracts to so-called fair trade prices. The sales experience of Eli Lilly and Company has been continuously favorable in the territory of northern Ohio where Hudson Distributors, Inc. is operating although there has not been a time when the sale of products of Eli Lilly and Company did not take place at prices below the manufacturer's suggested retail price.

Affiant further says that no drug store or retail outlet in the City of Cleveland has discontinued the sale of Eli Lilly and Company products due to the activities of Hudson Distributors, Inc. Furthermore, since Eli Lilly and Company is one of the largest producers of drugs and related products in the United States, no business dealing in drugs

can afford to discontinue the sale of the products distributed by Eli Lilly and Company.

Affiant further says that the sale of Eli Lilly and Company products by Hudson Distributors, Inc. has not and cannot result in injury to Eli Lilly and Company as evidenced by the fact that no injury whatsoever was suffered by Eli Lilly and Company during the period of time that the State of Ohio did not have a Fair Trade Law.

Affiant further says that the consuming public has come to recognize that Hudson Distributors, Inc., through its economical operations, is able to sell various commodities in its store at prices below those generally charged in the field. The activities of Hudson Distributors, Inc. have been beneficial to the consuming public and to Eli Lilly and Company by creating a wider market for the products of Eli Lilly and Company at a reasonable price.

Further Affiant saith not.

BERNARD SHULMAN.

(Jurat omitted.)

[fol. 33]

PLAINTIFF'S EXHIBIT 2 TO STIPULATION

Affidavit of Ernest C. T. Santora.

STATE OF OHIO,
COUNTY OF CUYAHOGA, SS.

ERNEST C. T. SANTORA, being first duly sworn according to law, deposes and says that:

1. He is a partner in the firm of Mendelsohn, Krottinger, Lane, Santora and Shaw, Attorneys-at-Law, 218 Chester-Twelfth Building, Cleveland 14, Ohio, Attorneys for Plaintiff.

2. He has obtained from Hudson Distributors, Inc., the monthly sales figures for the total sales of proprietary drugs; the sales of Lilly proprietary drugs, the total sales of prescription drugs, the sales of Lilly prescription drugs, the total sales of vitamins, the sales of Lilly vitamins and the sales of Revco vitamins from the date it began operations in May 1958.

3. The percentage increases in the sales of proprietary drugs for the year beginning May, 1959 and ending April, 1960 over the comparable 1958-1959 period are as follows:

Total sales of proprietary drugs	38.5%
Sales of Lilly proprietary drugs	144.4%

4. Hudson Distributors, Inc. did not start its prescription department until June, 1959.

5. The percentage of prescription drugs sold with relation to the total of proprietary and prescription drug sales per month is as follows:

[fol. 34]

June, 1959	1.0%
July, 1959	5.0%
August, 1959	7.0%
September, 1959	8.6%
October, 1959	9.9%
November, 1959	11.6%
December, 1959	13.8%
January, 1960	14.0%
February, 1960	16.5%
March, 1960	16.4%
April, 1960	18.8%
May, 1960	19.3%

6. The percentage of Lilly prescription drugs sold with relation to the total of Lilly proprietary and Lilly prescription drug sales per month is as follows:

June, 1959	0.6%
July, 1959	2.5%
August, 1959	3.4%
September, 1959	3.8%
October, 1959	4.1%
November, 1959	4.4%
December, 1959	5.5%
January, 1960	5.6%
February, 1960	6.8%
March, 1960	6.7%
April, 1960	7.9%
May, 1960	8.1%

7. The percentage increases in these sales of vitamins for the year beginning May, 1959 and ending April, 1960, over the comparable 1958-1959 period are as follows:

Total sales of vitamins	42.8%
Sales of Lilly vitamins	38.0%

8. Hudson did not begin the distribution of Revco vitamins until June of 1959.

[fol. 35] 9. The percentage of Revco vitamins sold with relation to the Lilly vitamins sales per month is as follows:

June, 1959	10.3%
July, 1959	13.9%
August, 1959	15.5%
September, 1959	18.1%
October, 1959	20.6%
November, 1959	23.3%
December, 1959	25.8%
January, 1960	33.4%
February, 1960	25.7%
March, 1960	33.3%
April, 1960	33.6%
May, 1960	33.5%

10. The percentage of Revco Vitamins sold with relation to the total vitamin sales per month is as follows:

June, 1959	1.8%
July, 1959	2.0%
August, 1959	2.7%
September, 1959	3.2%
October, 1959	3.5%
November, 1959	3.6%
December, 1959	4.5%
January, 1960	5.8%
February, 1960	4.5%
March, 1960	5.8%
April, 1960	5.9%
May, 1960	5.9%

11. All products sold by Hudson Distributors, Inc. are sold at a profit and at the same mark-up. No products are

used as "loss leaders" or "bait merchandise." The profits on the sale of one item are in no way used to finance the sale of any other item.

12. In addition, the growth and percentage of sales of prescription drugs with relation to the total of proprietary [fol. 36] and prescription drug sales in the twelve month period since Hudson Distributors, Inc. established a Prescription Department illustrates the utility of the Prescription Department of Hudson Distributors, Inc.

13. Further, affiant saith not.

ERNEST C. T. SANTORA.

(Jurat omitted.)

[fol. 37]

DEFENDANT'S EXHIBIT E TO STIPULATION

(Filed in Common Pleas Court June 25, 1960.)

Transcripts of the hearings of the Ohio General Assembly on House Bill No. 318, the Ohio Fair Trade Act, being hearings before the Ohio House Judiciary Committee on April 15, April 22 and April 29, 1959, and before the Ohio Senate Judiciary Committee on May 28, June 4 and June 9, 1959.*

(* Clerk's Note—Such Transcripts are printed in the Record in Hudson Distributors, Inc. v. [REDACTED] 489 in the Supreme Court of the United States.) UPDOWN CO.

[fol. 38]

DEFENDANT'S EXHIBIT F TO STIPULATION

Affidavit of J. H. Rushton.

STATE OF INDIANA,
COUNTY OF MARION, ss.

J. H. RUSHTON, being first duly sworn, says that:

1. He is the manager of the Accounting Analysis Department of defendant herein, Eli Lilly and Company, and

as such is familiar with the product lines of Eli Lilly and Company and with the record of its sales.

2. The following figures showing the sales trends of four product lines of Eli Lilly and Company nationally, in Ohio and in Cleveland were prepared in his Department and under his supervision.

3. The product line designated "Iletin" is the insulin line of Eli Lilly and Company, and includes its preparations known as "Regular Iletin," "Lente Iletin," "NPH Iletin" and "Protamine, Zinc & Iletin."

The product line designated "Vitamins" is the oral and injectory vitamin line of Eli Lilly and Company, and includes its preparations known as "Mi-Cebrin," "Multicebrin," "Homicebrin," "Procebrin" and "Vi-Mix Drops"; over 90% of the sales in this product line are of the oral vitamin preparations.

[fol. 39] The product line designated "V-Cillin" is the penicillin V (acid form) line of Eli Lilly and Company, and includes its preparations known as "V-Cillin" and "V-Cillin Drops" as well as "V-Cillin K" (Penicillin V-Potassium).

The product line designated "Ilotycin-Ilosone" is a line of antibiotics of Eli Lilly and Company and includes its preparations known as "Ilotycin," "Ilotycin Sulfa," "Ilosone" and "Ilosone Lauryl Sulfate Drops."

4. The Iletin and oral Vitamin product lines are sold at retail without a physician's prescription. The sales of these product lines are fairly representative of the sales of all pharmaceuticals produced by Eli Lilly and Company which are sold at retail without prescription.

5. The V-Cillin and Ilotycin-Ilosone product lines are sold at retail only on a physician's prescription. The sales of these product lines are fairly representative of the sales of all pharmaceuticals produced by Eli Lilly and Company which are sold at retail on prescription only.

6. The percentage increases or decreases of the sales of these product lines for the year 1958 over the year 1957 to wholesalers nationally, in Ohio and in Cleveland are as follows:

Product Line	Trend of Sales Nationally	Trend of Sales In Ohio	Trend of Sales in Cleveland
Iletin	— 3.9%	— 7.9%	— 8.2%
Vitamins	3.6	— 7	— 5.7
V-Cillin	— 7.1	— 13.5	— 12.3
Ilotycin-Ilosone	28.4	21.6	7.6

7. The percentage increases and decreases of the sales of these product lines for the year 1959 over the year 1958 to wholesalers nationally, in Ohio and in Cleveland are as follows:

[fol. 40]

Product Line	Trend of Sales Nationally	Trend of Sales In Ohio	Trend of Sales in Cleveland
Vitamins	4.8	4.0	— 5.6
Iletin	3.2%	1.7%	— 3.5%
V-Cillin	— 8.3	— 8.6	— 12.3
Ilotycin-Ilosone	24.0	31.3	37.8

8. The percentage increases or decreases of the sales of all pharmaceuticals produced by Eli Lilly and Company (including the four product lines specified above) for 1958 over 1957, and for 1959 over 1958 to wholesalers nationally, in Ohio and in Cleveland are as follows:

	Trend of Sales Nationally	Trend of Sales In Ohio	Trend of Sales in Cleveland
1958 over 1957— all products	— 13.5%	— 13.9%	22.0%
1959 over 1958— all products	6.3	7.3	3.9

J. H. RUSHTON,

(Jurat omitted.)

[fol. 41]

DEFENDANT'S EXHIBIT G TO STIPULATION.
(Filed in Common Pleas Court June 25, 1960.)

Affidavit of William R. Hutchinson.

WILLIAM R. HUTCHINSON, being first duly sworn, deposes and says that:

1. He is the Director of Sales, East-Central Region, of Eli Lilly and Company, which territory includes the State of Ohio and the City of Cleveland; and that he is familiar with the business of Eli Lilly and Company generally, including its promotional and advertising programs and its trade relationships and specifically its business in Ohio and in the Cleveland area.
2. The pharmaceuticals and other commodities produced by Eli Lilly and Company are sold directly to authorized wholesalers. There are eleven authorized wholesalers in Ohio. The authorized wholesalers in Cuyahoga County, Ohio, are McKesson & Robbins Company and Cleveland Wholesale Drug. The products of Eli Lilly and Company are sold and distributed by the wholesalers to retail pharmaceutical outlets from which such commodities are sold at retail.
3. Eli Lilly and Company extensively promotes and advertises its commodities nationally and at the local level promotes its products to the medical profession, hospitals and retail pharmaceutical outlets.
4. Eli Lilly and Company has acquired and possesses a valuable reputation and goodwill with the medical profession, the retail pharmaceutical trade and the public generally which is attached to its trademarks, trade names and brand names.
5. By reason of the goodwill Eli Lilly and Company enjoys with the retail pharmaceutical trade, its commodities have been widely advertised, promoted, displayed and recommended by such retail pharmaceutical outlets to their customers.

[fol. 42] 6. When the new Ohio Fair Trade Act was enacted by the Ohio General Assembly, Eli Lilly and Company entered into a number of fair trade contracts with Ohio retail pharmaceutical outlets which established minimum retail resale prices for commodities produced by Eli Lilly and Company. There are over 1,420 such contracts now in effect in the State of Ohio. About 65% of the retail pharmaceutical outlets in the State of Ohio, and about 50% of the retail pharmaceutical outlets in the Cleveland area, have entered into such fair trade contracts. All such contracts are in the form of the contract attached to the Answer and Cross Petition herein as "Exhibit B."

7. The plaintiff, Hudson Distributors, Inc., has followed a policy of wilfully and knowingly selling commodities produced by Eli Lilly and Company in the Cleveland area at prices less than the minimum retail resale prices established by Eli Lilly and Company.

8. Eli Lilly and Company has received numerous written communications from Cleveland retail pharmaceutical outlets which observe its legally established minimum retail resale prices complaining of the plaintiff's practice of not observing such practices. I personally have received a number of similar complaints orally, and oral complaints which have been made to my staff by retail pharmaceutical outlets in Ohio and in the Cleveland area have been passed on to me.

9. Some retail pharmaceutical outlets in the Cleveland area which would otherwise observe the established minimum retail resale prices for Eli Lilly and Company commodities have been forced by reason of plaintiff's price cutting to sell such commodities at prices below the established minimum retail resale prices.

10. In the affiant's opinion, plaintiff is able to cut the prices on Eli Lilly and Company commodities for a number of reasons, including low overhead costs, large volume of sales, the lack of services offered the customer, and the [fol. 42a] realization of a higher margin of profit on other goods carried by the plaintiff which have no national trademark and are not nationally advertised and priced.

11. Many Cleveland retail pharmaceutical outlets cannot compete with a store such as plaintiff's, because of plaintiff's pricing policy, and will either discontinue selling Eli Lilly and Company commodities entirely, or will not exert any effort towards the sale of Eli Lilly and Company commodities. In some cases a retailer in this situation will recommend off-brand products which are not fair traded rather than lose a customer to buy a fair traded item at a store such as plaintiff's.

12. The marketing of commodities such as those produced by Eli Lilly and Company depends on a widespread distribution system with as great a number of retail outlets as possible. The loss of retail pharmaceutical outlets in Ohio and in the Cleveland area will weaken the distribution system of Eli Lilly and Company, and will result in decreased sales.

13. The action of Cleveland retail pharmaceutical outlets in no longer displaying and promoting Eli Lilly and Company commodities by reason of the unfair competition of plaintiff's store has contributed to a decrease in sales by Eli Lilly and Company in the Cleveland area of the kind of commodities which are sold by plaintiff.

14. The fact that an Eli Lilly and Company commodity is sold in the Cleveland area for one price in plaintiff's store and for another price in the retail pharmaceutical outlet observing the established minimum retail resale price causes confusion in the consumer's mind as to the true value of that commodity. Complaints have been made to my office and to my staff concerning the different prices charged for Eli Lilly and Company commodities in the Cleveland area, and Eli Lilly and Company has thereby suffered a loss of goodwill with the buying public.

WILLIAM R. HUTCHINSON.

(Jurat omitted.)

[fol. 43]

IN THE COURT OF COMMON PLEAS

DOCKET AND JOURNAL ENTRIES

October 22, 1959 Petition and precipe filed and summons issued, and a copy of petition by certified mail—mailed to Mark McElroy, Attorney General for the State of Ohio.

October 24, 1959 Certified Mail receipt returned endorsed by Attorney General and filed.

October 31, 1959 Summons returned, endorsed: on the 22nd day of October 1959 I served this writ on the within named Eli Lilly and Company, a corporation by [fol. 44] handing to Martha Wilson, Office Manager, a true and certified copy thereof with all the endorsements thereon, The President or other chief officer of said company not found in my county. Also on the 23rd day of October 1959 I served this writ on the within named Eli Lilly and Company a Corporation, by sending to their last known address 740 South Alabama Street Indianapolis, Indiana by registered mail, postage prepaid, a true and certified copy thereof with all the endorsements thereon. The signed return receipt No. 773421 is hereto attached and goes to make a part of the return of service of this writ. Sheriff's Fees: \$2.34.

November 19, 1959 Consent granted defendant to move or plead by December 21, 1959.

December 21, 1959 Demurrer of Defendant filed.

January 11, 1960 Amended petition for declaratory judgment filed.

January 29, 1960 Consent granted defendant to move or plead by February 29, 1960.

February 24, 1960 To Court: Amended Petition having been filed, Demurrer to the petition stricken. Signed Joseph H. Silbert, Judge. (Civil Journal 350, page 539.)

February 29, 1960 Answer and Cross Petition by defendant filed.

March 10, 1960 Motion for temporary injunction by defendant filed.

March 31, 1960 To Court: Motion of Defendant to advance granted. Cause ordered advanced to trial list for May 11, 1960. (Civil Journal 350, page 961.)

April 21, 1960 Answer to Cross petition by Plaintiff filed.

June 10, 1960 Agreed statement of facts filed.

June 10, 1960 Brief in support of petition by plaintiff filed.

June 23, 1960 Brief of defendant in support of the validity of The Ohio Fair Trade Act filed.

[fol. 45] June 24, 1960 Affidavit of service filed.

June 25, 1960 Stipulation filed.

July 7, 1960 Reply to brief of defendant filed.

July 28, 1960 Opinion of the Honorable Eugene McNeill filed.

JUDGMENT—July 28, 1960

To Court: This cause came on to be heard, upon the pleadings, the evidence, the oral argument of counsel, and upon the briefs submitted by counsel of record and amicus curiae.

The Court finds that it has jurisdiction of the parties hereto, of the subject matter of the action, and that all things have properly been done to bring the subject and all parties before the Court.

The Court finds that there has been an enactment in the State of Ohio of R. C. 1333.27-1333.34, inclusive entitled "Fair Trade and Minimum Resale Prices" effective October 22, 1960, and that said act permits a producer or distributor trade-marking or trade-naming an article for retail sale which is in free and open competition with the same general class produced by others and offered for sale in the same general market area, or their designees, to control by notice to distributors, or by contract stipulated minimum resale prices for such commodities; that no standards or limitation of any type is provided to control the discretion of said person setting said price, and that therefore, said act is in violation of Section I, Article 2 of the Constitution of the State of Ohio;

That said provisions are an integral and inseparable part of said act and because thereof, R. C. 1333.27-1333.34, inclusive, are in violation of the Constitution of the State of Ohio, and are of no force and effect; that plaintiff's rights in the sale of its property are affected thereby; and that there is a controversy and judiciable issue before the Court.

It Is Therefore Ordered, Adjudged and Decreed that R. C. 1333.27-R. C. 1333.34, inclusive, of the State of Ohio, [fol. 46] are violative of Section I, Article 2 of the Constitution of the State of Ohio, and therefore are void and are not binding upon the plaintiff herein. It is further ordered that the cross petition of defendant be, and the same hereby is dismissed, at the costs of the defendant herein. Exceptions allowed. Signed Eugene R. McNeill, Judge (By Assignment) Received for filing, July 28, 1960. Emil J. Masgay, Clerk of Courts By H. Kwarciany, Deputy. (Civil Journal 351, page 1266.)

August 16, 1960 Notice of Appeal filed by Defendant Eli Lilly & Company together with precipe. (Law.)

(Duly Certified.)

IN THE COURT OF COMMON PLEAS

OPINION, McNeill, J., in the cases of *Hudson Distributors, Inc. v. The Upjohn Company*, No. 727,805 and *Hudson Distributors, Inc. v. Eli Lilly & Company*, No. 730,118, dated July 28, 1960 (printed in companion case of *Hudson Distributors, Inc. v. The Upjohn Company*, No. 489 in the Supreme Court of the United States).

IN THE COURT OF APPEALS

OPINION, Skeel, J., and DISSENTING OPINION, Hurd, J., in the cases of *Hudson Distributors, Inc. v. The Upjohn Company*, No. 25,371 and *Hudson Distributors, Inc. v. Eli Lilly & Company*, No. 25,374, dated July 13, 1961 (printed in

companion case of *Hudson Distributors, Inc. v. The Upjohn Company*, No. 489 in the Supreme Court of the United States).

[fol. 47]

IN THE COURT OF APPEALS

EIGHTH DISTRICT, CUYAHOGA COUNTY, OHIO

No. 25,374.

HUDSON DISTRIBUTORS, INC., Plaintiff-Appellee,

vs.

ELI LILLY & COMPANY, Defendant-Appellant.

PETITION FOR REHEARING—Filed in the
Court of Appeals July 17, 1961

Now comes the plaintiff-appellee and petitions this Honorable Court for a rehearing on the following grounds:

1. This Honorable Court does not appear to have considered the impact of the "Supremacy Clause" of the Federal Constitution (Article VI, Constitution of the United States) upon the validity of Sections 1333.27 through 1333.34 inclusive of the Ohio Revised Code. The Congress of the United States has clearly indicated that a Congressional Amendment to the McGuire Act is required to authorize implied "fair trade" contracts by notice, as provided by the New Ohio Fair Trade Law. Section 5(a) (2) and Section 5(a) (3) of the McGuire Act, as presently in force, permit the enactment of state legislation authorizing only consensual contracts or agreements prescribing "fair trade" prices.

2. This Honorable Court does not appear to have considered that the plaintiff herein purchased the goods manufactured by the defendants from a third party wholesaler located outside of Ohio, which did not require that defendants' goods be sold at defendants' respective stipulated

[fol. 48] retail prices. Although this Honorable Court did discuss the effect of Section 1333.27 through 1333.34 inclusive, Ohio Revised Code, in creating an implied contract where the manufacturer or distributor who has fixed minimum retail prices has resold the product to the retailer, the Court does not appear to have discussed creation of an implied contract under the stipulated facts of this case, i.e., where all of plaintiff's goods were purchased from outside of Ohio from a wholesaler who did not seek to set minimum retail prices.

3. This Honorable Court did not discuss the effect on the New Ohio Fair Trade Act of Section 5(a)(5) of the McGuire Act which prohibits contracts or agreements which provide for the establishment or maintenance of "horizontal" minimum or stipulated resale prices of any commodity between persons, firms or corporations which are in competition with each other.

In direct contravention of Section 5(a)(5) of the McGuire Act and of the Supremacy Clause of the United States Constitution, Section 1333.29 (a) of the Ohio Revised Code, as an integral and inseparable portion of the Fair Trade Act, permits a proprietor to establish retail and wholesale fair trade prices, and control minimum wholesale prices for a commodity of which he is the proprietor, even though the price-setting proprietor sells such fair traded commodities to retailers in competition with such wholesalers.

Wherefore, it is prayed that this Honorable Court grant this Petition for Rehearing.

Respectfully submitted,

Lane, Krotinger & Santora, By Myron N. Krotinger,
By Leonard Lane, Attorneys for Plaintiff-Appel-
lee.

[fol. 49]

IN THE COURT OF APPEALS
DOCKET AND JOURNAL ENTRIES

DOCKET AND JOURNAL ENTRIES IN THE COURT OF APPEALS
 August 26, 1960. Transcript and original papers from
 Common Pleas Court, filed.

October 24, 1960. Defendants Bill of Exceptions, filed.
 (4 Vols.)

December 31, 1960. Motion to file brief amicus curiae.
 1 copy filed.

January 10, 1961. To Court: Motion by Ohio Hardware
 Association, The Cleveland Academy of Pharmacy, Ohio
 Retail Food Dealers, Ohio Association of Tobacco Dis-
 tributors, Ohio Retail Jewelers Association, and the Ohio
 State Pharmaceutical Association for permission to file
 brief amicus curiae instantan granted. Exceptions. Signed
 Joy Seth Hurd, Presiding Judge. (Journal 25, page 11.)

January 19, 1961. Assignment of error and brief of De-
 fendant-Appellant Eli Lilly and Company. (2) copies, filed.

January 26, 1961. Motion to file brief Amicus Curiae,
 filed.

January 31, 1961. To Court: Motion by Bargain Fair,
 Inc. and Claber Distributing Company, Inc. to file com-
 bined brief amicus curiae herein granted. Exceptions.
 Signed Joy Seth Hurd, Presiding Judge. (Journal 25, page
 32.)

February 24, 1961. Answer Brief of Plaintiff-Appellee
 (2) copies, filed.

March 27, 1961. Reply Brief of Defendant-Appellant (2)
 copies, filed.

May 3, 1961. Brief Amicus Curiae on behalf of Bargain
 Fair, Inc., and Claber Distributing Company, Inc., D.B.A.
 "Uncle Bills" (2) copies, filed.

May 20, 1961. Memorandum Brief of Defendant-Appel-
 lant in reply to brief Amicus Curiae (2) copies, filed.

[fol. 50] July 17, 1961. Plaintiff-Appellee's petition for
 rehearing and brief in support thereof. (2) copies, filed.

September 8, 1961. Brief of Defendant-Appellant in op-
 position to petition for rehearing. (2) copies, filed.

ORDER DENYING PETITION FOR REHEARING

September 21, 1961. To Court: Petition by plaintiff-appellee for rehearing denied. Joy Seth Hurd, Judge dissents. Signed Julius M. Kovachy, Presiding Judge. (Journal 25, page 274.)

JUDGMENT—September 27, 1961

To Court: This cause came on to be heard upon appeal on questions of law from the judgment of the Court of Common Pleas of Cuyahoga County, the assignment of error, bill of exceptions, transcript of the docket and journal entries in the Court of Common Pleas of Cuyahoga County, and briefs, and was argued by counsel and submitted to the Court.

Upon consideration whereof, the Court finds that the Court of Common Pleas of Cuyahoga County erred to the prejudice of the Defendant-Appellant in declaring Sections 1333.27 through 1333.34 of the Ohio Revised Code violative of the Constitution of the State of Ohio, and therefore void and not binding upon the Plaintiff-Appellee, and in granting judgment for the Plaintiff-Appellee on its petition and dismissing the cross petition of the Defendant-Appellant.

The Court further finds that Sections 1333.27 through 1333.34 of the Ohio Revised Code are valid, lawful, and enforceable enactments of the Ohio General Assembly and do not violate the Constitution of the State of Ohio or the Constitution of the United States, or any law of the United States.

It is therefore considered, ordered and adjudged that the judgment of the Court of Common Pleas of Cuyahoga County be and the same is hereby reversed and held for naught. And the Court coming now to render the judgment which the Court of Common Pleas of Cuyahoga County ought to have rendered, it is considered, ordered and ad- [fol. 51] judged that Sections 1333.27 through 1333.34 of the Ohio Revised Code be and the same hereby are declared to be valid, lawful and enforceable enactments of the Ohio General Assembly and not to be in violation of the Constitution of the State of Ohio or of the Constitution of the United States or of any law of the United States; that final

judgment be and the same hereby is now entered in this Court for the Defendant-Appellant on the petition filed in this cause in the Court of Common Pleas of Cuyahoga County by the Plaintiff-Appellee; that this cause be remanded to the Court of Common Pleas of Cuyahoga County to carry this judgment into effect and for execution, and for further proceedings according to law with respect to the cross-petition filed in this cause by the Defendant-Appellant; and that the Defendant-Appellant recover from the Plaintiff-Appellee its costs herein expended.

To all of which the Plaintiff-Appellee, by its counsel, excepts. Signed Julius M. Kovachy, Presiding Judge. (Journal 25, page 281.)

September 29, 1961. Notice of Appeal to the Supreme Court of Ohio filed by Plaintiff (Appellee) on constitutional question and condition on motion to certify.

(Duly certified.)

IN THE SUPREME COURT OF OHIO

OPINION, Griffith, J., and DISSENTING OPINION, Zimmerman, J., in the cases of *Hudson Distributors, Inc. v. The Upjohn Company*, No. 37,320 and *Hudson Distributors Inc. v. Eli Lilly & Company*, No. 37,321, dated May 8, 1963 (printed in companion case of *Hudson Distributors, Inc. v. The Upjohn Company*, No. 489 in the Supreme Court of the United States).

[fol. 52]

IN THE SUPREME COURT OF OHIO

JOURNAL ENTRIES

JUDGMENT—May 8, 1963

Journal 45, Page 555

Appeal from the Court of Appeals for Cuyahoga County

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court

of Appeals is affirmed; and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the defendant appellee recover from the plaintiff appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

[fol. 53]

ORDER DENYING REHEARING—June 12, 1963

Journal 45, Page 623

It is ordered by the Court that rehearing in these cases are denied.

[fol. 54]

[File endorsement omitted]

[fol. 55]

IN THE SUPREME COURT OF OHIO

Appeal From

The Court of Appeals of Cuyahoga County,
Eighth Judicial District

No. 37,321

HUDSON DISTRIBUTORS, INC., Plaintiff-Appellant,

vs.

ELI LILLY & COMPANY, Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF
THE UNITED STATES—Filed August 1, 1963

I. Notice is hereby given that Hudson Distributors, Inc., the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the

Supreme Court of Ohio entered in this action on June 12, 1963 denying appellant's application for rehearing of the judgment of the Supreme Court of Ohio rendered on May 8, 1963, which had affirmed the judgment of the Court of Appeals of Cuyahoga County.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in the said transcript all pleadings, original papers, testimony and evidence offered, heard and taken into consideration in rendering the judgment aforesaid.

[fol. 56] III. The following questions are presented by this appeal:

1. Whether the Ohio Fair Trade Act violates the Supremacy Clause of the Federal Constitution in that:

- (a) The Act attempts to repeal Section 5(a)(5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the proprietor of a trademark or trade name to establish minimum resale prices for wholesalers with whom the proprietor is in competition;
- (b) The Act attempts to repeal Section 5(a)(5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the proprietor of a trademark or trade name to compel its distributors to enter into "horizontal" (i.e. at the same level of distribution), price fixing agreements or unlawful boycotting arrangements with other distributors;
- (c) The Act attempts to repeal Sections 5 (a)(2), (3), (4) and (5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the proprietor of a trademark or trade name to establish minimum resale prices by notice to distributors without the consensual agreement intended by Congress.

2. Whether the Ohio Fair Trade Act is unconstitutional under the Due Process Clause of the 14th Amendment to

the Federal Constitution in that the Act confers upon the proprietor of a trademark or trade name a "proprietary interest" in a commodity despite the sale of and receipt of the full price for such commodity with the trademark or trade name affixed thereon, and by reason of such "proprietary interest" empowers the proprietor to compel a remote non-consenting vendee to adhere to a minimum resale price.

[fol. 57] 3. Whether the federally unconstitutional provisions of the Ohio Fair Trade Act are so commingled and intertwined with the remainder of the Act and so inseparable therefrom as to make the entire Act unconstitutional under the Federal Constitution.

Lane, Krotinger & Santora, Attorneys for Plaintiff-Appellant, 300 Chester-Twelfth Building, Cleveland 14, Ohio, By Myron N. Krotinger.

[fol. 58] Proof of Service (omitted in printing).

[fol. 59] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 60]

SUPREME COURT OF THE UNITED STATES
No. 490—October Term, 1963

HUDSON DISTRIBUTORS, INC., Appellant,

vs.

ELI LILLY & COMPANY

ORDER NOTING PROBABLE JURISDICTION—December 9, 1963

Appeal from the Supreme Court of the State of Ohio.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is placed on the summary calendar and set for argument immediately following No. 489.